89-5346

In the

Supreme Court of The United States

No. _____

October Term, 1988

WILLIAM J. BRADLEY,

PETITIONER,

-VS-

STATE OF OHIO,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED

I. Does Ohio's Mandatory Capital Sentencing Scheme Prevent A Capital Jury From Deciding Whether Death Is The Appropriate Punishment For A Capital Defendant Thereby Rendering Ohio's Death Penalty Statute Unconstitutional?

II. Whether The Standard For Determining Ineffective Assistance Of Counsel Established In Strickland v. Washington Is A Functional Standard For Reviewing The Claim On Direct Appeal?

III. Whether A Penalty Phase Instruction That Tells Jurors "You Must Not Be Influenced By Any Consideration Of Sympathy Or Prejudice" Misleads The Jurors Into Believing They Were Bound To Ignore Sympathy Engendered By The Mitigating Evidence And Thus, Ineffect, The Evidence Itself?

IV. Whether A Person Who Is Already In Prison, Who Is Strip-Searched, And Detained From Leaving An Area, Is "In-Custody" Within The Meaning Of Miranda V. Arizona And Therefore Must Receive The Miranda Warnings Before He Is Questioned Concerning A Crime That Has Been Committed?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioner, William J. Bradley, prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in the above-entitled proceeding on May 10, 1989.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported as State v. Bradley 42 Ohio St. 3d 136 (1989). (Appendix A-2 - A-28.) The opinions of the Court of Appeals, Fourth District and the Court of Common Pleas, Scioto County, are unreported and reprinted in the appendix. (Appendix A-114 - A-253.)

JURISDICTIONAL STATEMENT

The Petitioner's convictions and death sentences were affirmed by the Ohio Court of Appeals, Fourth District. Petitioner appealed as a matter of right to the Ohio Supreme Court (Ohio Constitution, Section (2)(B)(2)(a)(ii), Article IV). The Ohio Supreme Court affirmed the decision of the Court of

Appeals on May 10, 1989. On May 22, 1989, Petitioner filed a Motion for Rehearing. The Motion for Rehearing was denied by the Ohio Supreme Court on June 14, 1989.

The jurisdiction of this Court to review the judgment of the Ohio Supreme Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following Amendments to the United States Constitution:

A) The Fifth Amendment, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B) The Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

C) The Eighth Amendment which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D) The Fourteenth Amendment, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, within the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Ohio statutes or rules that are implicated are reprinted in the Appendix.

STATEMENT OF THE CASE

Eric Bowling was the Supervisor in the sheet metal shop at the Southern Ohio Correctional Facility. On February 2, 1984, he was beaten to death at approximately 8:15 a.m. as the shop was opening.

No eyewitnesses immediately appeared to indicate who perpetrated the assault. Tr. 1075, 1088. As a result, all inmates who were in the shop at the time were herded into the break area. Each inmate was called up individually, strip searched and interrogated concerning the fatal beating. Tr. 1152.

William J. Bradley, the Petitioner, was about the fourth inmate str'p searched. Prior to his being interrogated and searched, he had gone up to the authorities and indicated that another inmate had not committed the beating, thereby implicating himself. Tr. 1153.

Eventually Mr. Bradley was searched and questioned. While he was removing his clothes, the prison guards found blood on them. He was immediately asked, without the benefit of Miranda warnings, the source of the blood and if he had killed the decedent. Mr. Bradley responded "yes" to both questions. Tr. 1112, 1142. Mr. Bradley was immediately segregated in a cell by himself. Tr. 1112, 1142. He was finally Mirandized and promptly refused to make a statement. Tr. 1343.

At the request of the Superintendent of the Southern Ohio Correctional Facility, the staff psychologist conduct numerous tests upon Mr. Bradley. Mr. Bradley had a psychiatric history dating back to 1955. He had twice previously been in Lima State Hospital, once for a period of seven years. Since 1965, Mr. Bradley had consistently suffered from the delusion that he was controlled by a machine, that the machine could hear everything he said and knew all his inner thoughts. Tr. 1392. Mr. Bradley believed that the machine was controlled by the prison guards. Tr. 1405. He was diagnosed as a chronic paranoid schizophrenia. Tr. 1392.

While the mental evaluation was to be conducted for purposes of ascertaining if Mr. Bradley was suicidal, the real motive was apparently to

conduct an insanity and competency evaluation upon Mr. Bradley. The final report never addressed the issue of suicide. The test was administered to Mr. Bradley without him being Mirandized or being informed that it could be used against him at the guilt phase. Police Report p. 212.

On February 13, 1984, William J. Bradley, was indicted by a Scioto County Grand Jury. Appellant was charged with the aggravated murder of Eric Bowling in violation of Ohio Revised Code, Section 2903.01. Two death penalty specifications were attached; that the offense was committed while the offender was a prisoner in a detention facility as defined in R.C. 2929.04(A) and that prior to the offense at bar, the offender was convicted of an offense, an essential element of which was the purposeful killing of or attempt to kill another as defined in R.C. 2929.04(5).

On March 2, 1984, Mr. Bradley pled not guilty to all charges and requested court appointed counsel. The court appointed two local attorneys, neither of who had tried a capital case prior to representing Mr. Bradley.

On March 2, 1984, Mr. Bradley was arraigned on the charges in the present case. Two competency evaluations were conducted. Both reports concluded that Mr. Bradley had a long history of delusional thoughts, but was competent to stand trial. One of the reports concluded that this delusional system would impair his ability to assist counsel at trial (Litvak Competency Report).

On January 29, 1985, Mr. Bradley entered a plea of Not Guilty By Reason of Insanity. Because Mr. Bradley was unable to remember the events of February 2, 1984, the psychiatrist was unable to reach a conclusion within a reasonable degree of scientific certainty as to his sanity at the time of the commission of the offense. However, the examiner concluded:

> It is probable that he was psychotic at the time of the offense meaning that he was thinking in irrational ways. Whether his behavior was strictly in response to an irrational thought is unknown. Its probable that he understood right from wrong at the time but I doubt that he cared. As to whether or not he could refrain or adhere his behavior to the requirements of the law I don't know definitely as he would not or could not give me an account of his behavior on that day. At that time I could only say that he most likely was significantly impaired.

Helm Insanity Report.

On May 6, 1985, the trial commenced before a jury. During the entire trial, Mr. Bradley remained shackled. Tr. 24. No cautionary instructions were given by the trial court. The widow of the decedent remained in the court throughout voir dire. Tr. 6. Both the court and prosecutor made repeated references to the widow.

Counsel for Mr. Bradley gave no opening statement. Counsel initially reserved the right in the State's case and then later forgot to give it in the defense case. Tr. 1239.

Counsel for Mr. Bradley filed a motion to suppress in the middle of the State's case. Tr. 1067. Counsel admitted to the court that he had not interviewed the witnesses nor did he know which witnesses to call at the Motion to Suppress.

At the end of the State's case, the court admitted an entire two hundred eighty-five page police report into evidence. Tr. 1226. Trial counsel for Mr. Bradley made no objection.

Mr. Bradley testified on his own behalf and was the only witness called in the defense case. Tr. 1240. Defense counsel choose to put Mr. Bradley's entire prior forty year record into evidence despite the fact that it was not admissible.

The jury returned a guilty verdict after deliberating for approximately eight hours. Tr. 1353. During their deliberation they listened to excised portions of particular witnesses testimony (Tr. 1349), and a taped statement of Mr. Bradley exercising his Miranda rights. Tr. 1346.

The court again appointed Dr. Helm to conduct a psychological examination of Mr. Bradley for mitigation purpose. The psychological examination was

conducted in a three day period between the guilt and mitigation stages. The authors of the report were still working on the report at midnight before the mitigation phase.

The mitigation phase began on Monday morning and finished on Monday morning. Trial counsel for Mr. Bradley called Dr. Helm as the only witness. Tr. 1382.

The jury deliberated for forty-five minutes before recommending the death penalty. Tr. 1445. The trial court in a rambling opinion that consider numerous non-statutory aggravating factors, accepted the recommendation of the jury and imposed the sentence of death.

PRESERVATION OF THE FEDERAL QUESTION

The First Question presented was raised in the Court of Appeals as Assignment of Error No. I and in the Ohio Supreme Court as Proposition of Law No. XLIV.

The Second Question presented was raised in the Court of Appeals as Assignment of Error Nos. XXI, XXXVIII, LII, LIII and in the Ohio Supreme Court as Propositions of Law Nos. II, X, XXXIII, and XLI.

The Third Question presented was raised in the Court of Appeals as Assignment of Error No. XLV and in the Ohio Supreme Court as Proposition of Law No. XXXVII.

The Fourth Question presented was presented to the trial court in a Motion to Suppress, was raised in the Court of Appeals as Assignment of Error No. V and in the Ohio Supreme Court as Proposition of Law No. V.

Petitioner has relied on the Federal Constitution throughout his proceedings as a basis for relief.

REASONS FOR GRANTING THE WRIT

I.

OHIO'S MANDATORY CAPITAL SENTENCING SCHEME PREVENTS A CAPITAL JURY FROM DECIDING WHETHER DEATH IS THE APPROPRIATE PUNISHMENT FOR A CAPITAL DEFENDANT AND RENDERS OHIO'S DEATH PENALTY STATUTE UNCONSTITUTIONAL.

The decisions of this Court in the capital context have demonstrated a commitment to the principle that the decision to impose the death penalty

reflects an individualized assessment of the appropriateness of death for the particular crime and the particular defendant. This principle, that such punishment be directly related to the personal culpability of a criminal defendant, is the cornerstone of this Court's decisions in Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, 481 U.S. 393 (1987). These principles have also led this Court to invalidate mandatory death penalty schemes because they fail to give the jury the opportunity to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence. Gregg v. Georgia, 428 U.S. 153 (1976), Sumner v. Shuman, 483 U.S. 66 (1987).

While this Court has allowed jury discretion to be guided, it may not be entirely eliminated. This guiding or channeling function has been approved most recently in Franklin v. Lynaugh, ___ U.S. ___, 108 S. Ct. 2320 (1988). The Petitioner asserts that the mandatory nature of the Ohio Death Penalty Statute goes beyond said permissible guiding and improperly limits the full discretion the sentencer must constitutionally have in deciding the appropriate penalty.

The Ohio Death Penalty Statute provides that if the sentencer finds that an aggravating circumstance exists, and no mitigating factors exist, or if the sentencer finds that aggravating circumstances outweigh mitigating factors, "it shall impose sentence of death on the offender." Ohio Rev. Code Ann. Section 2929.03(D)(2)(Page 1988) (emphasis added). In the present case, in applying the weighing process, once the jury found the aggravating circumstances outweighed the mitigating factors, the jury had no choice but to impose death.

The United States Constitution does not permit a state law to require death unless the sentencer is convinced that death is the appropriate penalty. The word "shall" merely confuses the sentencer. Furthermore, use of this mandatory language can reasonably infer to the jury that it is not actually making a moral judgment concerning the appropriate penalty, but rather, is

bound by the law to return a verdict of death. In the present case, the prosecutor argued in his closing argument:

> ... And if, in fact, you are convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors then your jury verdict must be guilty of death ... death must be your verdict. Not maybe, not possibly, but shall be your verdict. If you have gone through the weighing process and find that the aggravating circumstances outweigh any mitigating factors, if you're convinced beyond a reasonable doubt. We have told you that two weeks ago. You know it today. And I'm sure you haven't forgotten it.

Tr. 1380-1381.

> The weighing process, it's in the Ohio Revised Code, it tells you there's a list of aggravating circumstances, and those things you shall consider in favor of imposing death. Not maybe. Not possibly. But you shall consider them in imposing death. They have mitigating circumstances that you shall weigh against the death penalty. And you're to balance them against each other, and if you're firmly convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigation factors, then your penalty shall be death.

Tr. 1424.

> And we don't make our decision based upon emotion. We base it on the facts, and you know the facts, and you know the law. And I think that you will, in fact, go back in that jury room and discuss this case among yourselves, and the conclusion you will come to is that the aggravating circumstances in this case do, in fact, outweigh the mitigating factor, if there is one, beyond a reasonable doubt. And then the law says your sentence shall be death.

Tr. 1431.

After the closing argument, the trial court instructed the jury:

> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances which William J. Bradley was found guilty of committing outweigh the mitigating factors, then you must return such finding to the Court by recommending to the Court that the death sentence be imposed upon this defendant, William J. Bradley.

Tr. 1438.

The trial court again noted the mandatory nature of Ohio's statute in its sentencing opinion:

> Pursuant to the provisions of Ohio Revised Code, Section 2929.03(D)(3), the trial jury having recommended that the sentence of death be imposed on William J. Bradley, it is the function of the trial court to determine whether the State has proved, beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors. If the Court so determines, the statute provides that the Court shall impose the sentence of death on the offender.

State v. Bradley, Scioto C.P. No. 84-34, (May 20, 1985), unreported, p. 3, Appendix A-238.

The fundamental issue in a capital sentencing proceeding is the determination of the appropriate punishment. Spaziano v. Florida, 468 U.S. 447 (1984). The capital sentencer must rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. Id. at 460. The appropriateness of the death penalty is an indispensable element of a constitutionally valid sentencing scheme. Principles of due process and the prohibition against cruel and unusual punishment demand that the sentencer make an individualized sentencing determination as to what punishment is appropriate. Zant v. Stephens, 462 U.S. 862 (1983); Barclay v. Florida, 463 U.S. 939 (1983). An individualized sentencing decision required that the jury be given the power to choose mercy.

In Lockett v. Ohio, supra, the United States Supreme Court established that the accused has the right to have the sentencer consider any relevant factors in determining whether the defendant merits leniency. Additionally, the sentencer must not be precluded from considering any aspect of a defendant's character or record of any circumstances of the offense as an independent mitigating factor. Id. at 607. This principle permits the sentencer to consider mercy in its sentencing decision. This Court endorsed the propriety of the consideration of mercy in Gregg v. Georgia, supra, at 190.

The mandatory nature of the instructions in this case combined with the prosecutor's argument to prevent the jury from determining the appropriate punishment in Mr. Bradley's case. Mr. Bradley's death sentence was arbitrary and capriciously imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

This Court has already accepted two cases for next term in which the question presented concerns the mandatory nature of the capital sentencing

statutes in Pennsylvania and California. Blystone v. Pennsylvania, 519 Pa. 450, 549 A. 2d 81 (1988), cert. granted, 109 S. Ct. 1567 (March 27, 1989)(U.S. No. 88-6222); Boyde v. California, 46 Cal. 3d 212, 250 Cal. Rptr. 83, 758 P. 2d 25 (1988), cert. granted, 109 S. Ct. 2447 (U.S. June 5, 1989)(No. 88-6613). Since the statutory procedure that will be examined in Blystone and Boyde is identical to Ohio's statutory scheme, Petitioner Bradley respectfully request that his petition for certiorari be granted and argued next term with Blystone and Boyde. In the alternative, Petitioner would request that a decision in his case be delayed until this Court determines the outcome of Blystone v. Pennsylvania and Boyde v. California.

II.

THE STANDARD FOR DETERMINING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, ESTABLISHED IN STRICKLAND V. WASHINGTON, IS NOT A FUNCTIONAL STANDARD FOR REVIEW OF THE CLAIM ON DIRECT APPEAL.

In the words of Justice Craig Wright of the Ohio Supreme Court in assessing Petitioner Bradley's representation at trial:

> The plain truth of the matter is that appellant would have been far, far better off remaining silent without anyone "representing" him.
>
> **I would invite the members of the United States Supreme Court to review this case.**

State v. Bradley, 42 Ohio St. 3d 136, 149-150 (1989) (Wright, J., dissenting).

The goal underlying the Sixth Amendment right to counsel is to ensure fairness in criminal process. However, subsequent to this Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), the state courts no longer examine whether a proceeding is fair. Courts have become immune to ineffective assistance of counsel claims and Strickland v. Washington has given them the perfect avenue to circumvent these claims.

In Strickland v. Washington, this Court set out the standard for examining an ineffective assistance of counsel claim.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing

> that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

However, this Court's explanation of the two prong test has set an impossible standard for criminal defendants to meet on the direct appeal of their conviction.

In assessing the first prong of the Strickland test, this Court provided guidelines for a reviewing court:

> 1) "the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-655.
>
> 2) the reviewing court should recognize that there are "... countless ways to provide effective assistance in any given case...." Id. at 689.
>
> 3) "[j]udicial scrutiny of counsel's performance must be highly deferential.
>
> 4) "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." Id.

If a defendant is able to meet these near impossible standards, he then has another obstacle to overcome. In order to meet the prejudice prong and warrant a reversal:

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

This Court also added that:

> If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Id. at 697.

In the five years since Strickland was decided, ineffective assistance of counsel has become non-existent claim on direct appeals. In collateral proceedings, such as the Strickland case itself, the introduction of additional facts, outside the record can at least aid in the ineffectiveness claim. In the direct appeal context, too often courts are quick to avoid the

issue by holding that the defendant was guilty and therefore the defendant was not prejudiced by the representation of counsel.

The standard set down in Strickland serves as a shield for defense attorneys, rather than a way to insure adequate representation. This is seen most clearly in the context of a capital case where the defense attorney is more often then not ill-equipped to handle capital cases.

Recently, in Murray v. Giarratano, ___ U.S. ___, 109 S. Ct. 2765 (1989), this Court held that neither the Eighth Amendment nor the due process clause requires states to appoint counsel for indigent death row inmates seeking post-conviction relief. In reaching this decision this Court noted the heightened procedural requirements on capital trials and sentencing proceedings, where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment, are sufficient to assure the reliability of the process by which the death penalty is imposed. Giarratano at 2770, 2772. Nevertheless, when applying the Strickland standard, these "heightened procedural requirements" fall by the wayside if there is evidence of a defendant's guilt. This is seen most clearly in the Sixth Amendment context when a court can find that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. In rejecting this notion, Justice Marshall, in Strickland, expressed the opinion that "the [Sixth Amendment] guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures." Strickland, Marshall, J. dissenting, 466 U.S. at 711. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer.

The record in Petitioner Bradley's case is replete with defense counsel's ineffectiveness. In the court below, Petitioner's counsel devoted four separate propositions of law solely to the ineffective assistance of counsel. Appendix A-40 - A-101. While these errors are incorporated in support of his argument here, three areas of ineffectiveness deserve special mention: (1) failure to prepare for trial, (2) consent to the admission of outrageous, improper and damning hearsay evidence, and (3) failure to present any opening argument to the jury.

(1) Failure to Prepare

By the time the victim was discovered in the sheet metal shop there were approximately thirty inmates and a number of guards present. The record indicates that defense counsel did not interview a single inmate or guard prior to trial. Tr. 1091.

The failure to interview any witnesses certainly hampered counsels' ability to formulate a trial strategy. Even Strickland v. Washington concludes that counsel has a duty to make a reasonable investigation or to make a reasonable decision that an investigation is unnecessary. Id. 691. In a capital case, such as this one, where the defendant takes the stand and proclaims his innocence, there can be no justification for a failure to interview witnesses.

2. Consent to the Admission of Inflammatory Hearsay

Due to the fact that counsel had not interviewed the witness and thus could not offer favorable facts through direct testimony, he allowed a two hundred eighty-five page "investigative report" to be admitted into evidence. The investigation report included but was not limited to the following information, (additional examples of items included in the investigative report can be found in Justice Brown's dissent to the opinion in the court below):

A. Newspaper articles.

The jury had been questioned on voir dire concerning pretrial publicity, yet there were copies of newspaper articles in the report that reported:

(i) Mr. Bradley had previously been sentenced to death

(ii) That the previous murder had been committed in a dispute involving $1.00

(iii) Erroneously implied Mr. Bradley had previously killed two persons

(iv) There had been a prayer vigil held for this victim

B. Mr. Bradley's entire criminal record.

There were eighteen pages of records concerning Petitioner's prior convictions.

C. A report and tape recording in which Mr. Bradley invoked his Miranda rights.

Mr. Bradley was given his Miranda rights and refused to waive them. A report by Investigator Teets was included in the 285 page investigative report stating that Mr. Bradley refused to talk. There was an unsigned Miranda form and a tape recording on which Mr. Bradley refused to talk after the officer stated "Bill, this is your chance to tell your side of the story."

D. Witness Statements.

There were ninety pages of witness statements. Many of these witnesses did not testify. Of particular note is the statement of an inmate that refused to testify and was one of only two witnesses who could establish prior calculation and design. Since this witness did not testify, he was not subject to cross-examination, however, the prosecutor used the statement in closing argument.

E. Psychological Report.

Petitioner Bradley had already been taken into custody when he was interviewed by a clinical psychologist. The purpose of the exam was supposedly to determine Mr. Bradley's mental state and determine whether he was a suicide risk. No Miranda warning were given, and the report included:

(i) prior uncharged bad acts

(ii) prior criminal record

(iii) the fact that he was previously on death row

(iv) statements that Bradley was a combative person

(v) statements concerning future dangerousness (not a factor to be considered in Ohio)

F. Statements of the State's witnesses concerning their willingness to take polygraph examinations.

While polygraph results are not admissible in Ohio, these statements served to bolster the credibility of two of the State's witnesses.

G. A copy of the indictment.

The indictment charged Mr. Bradley with the aggravating circumstance that he had committed a prior murder. Defense counsel had previously chosen to sever this specification from the indictment and have it tried separately to the court.

H. Prior Uncharged Acts of Misconduct.

The report included the following episodes:

(i) Bradley had assaulted an inmate while he was on death row the first time

(ii) Aggressive behavior Bradley showed towards the guards

(iii) He had struck a guard

(iv) He had hit a visitor with a tomato stake

Defense counsel had approximately one hour to review the 285 page report before he agreed to its admission. It would have been impossible to read the report in one hour and no extension of time was requested. The admission of the report was totally inconsistent with prior decisions counsel had made.

3. Waiver of Opening Statement

Defense counsel failed to make any opening statement. "Defense counsel, in opening statement, must reduce the effect of the prosecutor's opening by making the contradictory statement that will cast immediate doubt in the minds of the jurors. The failure to do so may cause some jurors to make up their minds before the first witnesses have been called." Strategies and Techniques in Criminal Defense (2 Ed. 1983) 143-144.

The sad reality in this case is that most likely defense counsel did not give an opening statement due to the failure to conduct pretrial investigation.

The majority opinion in the Ohio Supreme Court relies on evidence adduced at trial to determine that Mr. Bradley had committed the crime and the outcome of the trial would not have been different even if Mr. Bradley received effective assistance of counsel.

> [I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. One the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the

> possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

Strickland v. Washington, 104 S. Ct. at 2076 (Marshall, J., dissenting).

If assessing counsel's performance poses difficulties for a court, the burden on the defendant is surely equal. Simply put, superimposing an outcome-centered prejudice element on the basic ineffectiveness claim risks not only unwarranted imposition on courts confronted with the speculative task of retrying issues of guilt and innocence on a cold record, but also great unfairness to defendants.

The core of an effective assistance violation must always be found in highly unprofessional, unreasonable conduct, which almost by definition implies a severe threat of the defendant's interest - including his interest in a favorable verdict. Reliance on the outcome - determinative test for determining prejudice not only requires speculation, and too often the assumption that no prejudice exist, but also provides no incentive to a court-appointed attorney to provide effective representation. This is particularly true where a client admits his guilt or the state is able to present a strong case. Under these circumstances, an attorney need do nothing and will not be found ineffective. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly can obtain better representation then that available to an indigent defendant, who must rely on appointed counsel who have limited time as well as little incentive to provide effective representation.

The Sixth Amendment demands more then what this Court has provided in the prejudice prong of the Strickland test. Unlike the majority in the court below, who on a cold-record was convinced Mr. Bradley was guilty and therefore determined he did not receive ineffective assistance of counsel, the comments of the two dissenting judges deserve mention.

> However, I feel that my duty as a judge requires a course of decision-making which will protect the constitutional rights of every person, regardless of his or her station in life. This obligation does not stop even when confronted with a vicious individual such as Bradley.

> I suggest that no fair-minded person - be he layman or lawyer - could reasonably conclude that Bradley's counsel properly represented his client at trial. Likewise, the "report", which Justice Brown has dissected in detail, is just about the most prejudicial document I have ever encountered in my nineteen years as a judge, the analysis of the majority to the contrary notwithstanding.

State v. Bradley, 42 Ohio St. 3d 149 (Wright, J. dissenting).

> Put simply, I would reverse and send this case back for another trial because the integrity of the judicial process is called into question by the failings in the trial below.

Bradley at 150 (Brown, J. dissenting).

> The deficiencies here may be easier to see from another perspective. Would the public tolerate a prosecutor who, in an aggravated murder case: (1) did not, prior to trial, interview the witnesses? (2) failed to make an opening statement? and (3) consented to the admission of massive inadmissible evidence detailing the despicability of the victim?

Bradley at 157 (Brown, J. dissenting).

> Though our constitution and laws do not guarantee a perfect trial, they do demand a fair trial. This demand reaches its zenith when a person's life is at stake. It is true that society requires punishment for criminal behavior. The defendant in this case is singularly unappealing and his history of conduct is despicable (especially when consideration is given to the otherwise inadmissible descriptions and vignettes which are part of this record). However, there are other important values at stake here. These include the integrity of the judicial process, the conduct of a fair trial and the limitation of the evidence to that which is admissible under established precedent. The process by which this defendant stands convicted and sentenced is unacceptable.

Bradley at 158, (Brown, J. dissenting).

This Court should accept this case on certiorari and reexamine the prejudice prong of the ineffective assistance of counsel test out in Strickland v. Washington.

III.

THE PENALTY PHASE INSTRUCTION TELLING JURORS "YOU MUST NOT BE INFLUENCED BY ANY CONSIDERATION OF SYMPATHY OR PREJUDICE" MISLEAD THE JURORS INTO BELIEVING THEY WERE BOUND TO IGNORE SYMPATHY ENGENDERED BY THE MITIGATING EVIDENCE AND THUS IN EFFECT, THE EVIDENCE ITSELF.

In California v. Brown, 479 U.S. 538 (1987), a plurality of this Court stated that instructing the penalty phase jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" did not offend the Eighth Amendment:

> by concentrating on the noun "sympathy," respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on mere sympathy. Even a juror who was insisted on focusing on this one phase in the instruction would likely interpret the phrase as admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase.

Id. at 542, (emphasis in original). Despite the fact that the Brown plurality opinion relied on the "mere" qualifier as "the critical fact" in its analysis of the instruction, and indeed, that Justice O'Connor's concurrence acknowledged that a defendant's background or character also must be ignored "by such an instruction, Id. at 546, state and federal courts continue to approve instructions where this "critical fact" is absent. See, e.g., State v. Copeland, 530 So. 2d 526 (La. S. Ct. 1988); People v. Britz, 528 N.E. 2d 703 (Ill. 1988), cert. denied, 109 S. Ct. 1100 (1989); Byrne v. Butler, 847 F. 2d 1135, 1139-1140 (C.A.5, 1988); contra Parks v. Brown, 860 F. 2d 1545 (10th Cir., en banc 1988), cert. granted, sub. nom Saffle v. Parks, ___ U.S. ___, 109 S. Ct. 1930, (U.S. No. 88-1264)(April 24, 1989).

In Petitioner Bradley's case, the trial court instructed the jury as follows:

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact and apply the instructions of the Court to your findings and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried."

Tr. 1441, emphasis added.

The Ohio Supreme Court upheld the instruction. State v. Bradley, 42 Ohio St. 3d 136, 147-148 (1989).

In its earlier consideration of the issue, the Ohio court rejected constitutional concerns because the instruction "is intended to insure that

the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies." State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E. 2d 264, cert. denied, 472 U.S. 1032 (1984), reh'g denied, 473 U.S. 927 (1985), (Syllabus No. 3).

While this Court in Brown, acknowledged the intent of the California instruction, i.e., to insure that the sentencing decision is based on reviewable guidelines, all members of this Court continued beyond that point to the requisite constitutional inquiry: whether a reasonable juror would perceive the instruction as a directive to ignore mitigating evidence. The Ohio Supreme Court has not made that inquiry. Even post-Brown, the Ohio court has recited this Court's reliance on the "mere" language of the California instruction, and then totally ignored the fact that no such qualifier appears in the Ohio instruction. See, State v. Steffen, 31 Ohio St. 3d 111, 125, 509, N.E. 2d 383, 396 (1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1089 (1988).

In refusing to consider the propriety of this true "no sympathy" instruction, Ohio is seriously jeopardizing the reliability of its capital sentencing determinations. While some other states have also continued to uphold such instructions, one en banc circuit court has already found a similar instruction to be contrary to the Eighth and Fourteenth Amendments. In Parks v. Brown, supra, the Court condemned the instruction "[y]ou must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence." This Court has accepted certiorari in Parks to review this instruction. Petitioner would respectfully request that certiorari be granted in this case and that it be examined with Parks, or alternatively that his petition be held pending a resolution of this question in Parks.

IV.

A PERSON IS "IN CUSTODY" FOR THE PURPOSES OF MIRANDA IN A PRISON SETTING WHEN THAT PERSON IS DETAINED FROM LEAVING A. AREA AND IS STRIP-SEARCHED.

In Miranda v. Arizona, 384 U.S. 436 (1966), this Court held that a defendant's statements to law enforcement officials resulting from "custodial

interrogation" by these officials, could not be used against that defendant at trial unless the interrogation had been preceded by a warning to the defendant of various constitutional rights. At issue here is whether the questioning of Petitioner Bradley by prison officials, contravenes Miranda so that Petitioner Bradley's responses to these questions should not have been admitted into evidence.

The victim in this case was a sheet metal shop supervisor at the Southern Ohio Correctional Facility. He was killed by one of the inmates at the institution in the sheet metal shop.

Petitioner Bradley was an inmate at the institution and was one of many inmates working in the sheet mental shop.

By the time authorities in the institution arrived at the scene, there were thirty inmates present. Tr. 1110. The inmates were herded into a rest area where they began to strip search each inmate. Tr. 1111. During the search process, Petitioner Bradley had come forward, out-of-turn, and told the guards that the inmate they were searching had nothing to do with the incident. Tr. 1111.

The guards then decided to search Petitioner Bradley next, suspecting that he had something to do with the crime. Tr. 1111. During the search, the guards found a spot of blood on Petitioner Bradley. Tr. 1141. The guards then questioned Bradley:

> Q. And when Mr. Bradley came up with blood on his shirt you questioned him about it, didn't you?
>
> A. I asked what is this. He said blood. And I said where is it from. And he said over there.
>
> Q. Did he say anything else?
>
> A. Yes. He was asked by Officer Taylor, did you do that? And he said yes.

Tr. 1098.

> Q. The inmates detained there were being questioned as to what happened and searched.
>
> A. To some degree.
>
> Q. Mr. Taylor saw fit to ask Mr. Bradley whether he had killed Mr. Bowling?
>
> A. He asked him, yes, sir.

Tr. 1099.

It is uncontroverted that Miranda warnings were never given Petitioner Bradley. The evidence at trial and the finding of the trial court clearly states "granted it's admitted by Officer Seth, the Assistant Superintendent, that no Miranda warnings had been given to Mr. Bradley at the time..." Tr. 1119. The only dispute is whether the express questioning of Pecitioner by the prison officials constituted "custodial interrogation" sufficient to bring the Miranda safeguards into play. The prison confinement and the surrounding circumstances amounts to "custody" and the officials' questioning constituted "interrogation" in its most pristine sense, therefore the trial court's admittance of the officials' testimony recounting Petitioner's statements was reversible error.

The Petitioner's statements admitted into evidence resulted from questioning by two of the prison officials. Under both Miranda and the Court's decision in Rhode Island v. Innis, 446 U.S. 291 (1980), this express type of questioning constituted an interrogation. The Ohio Court of Appeals for the Fourth Appellate District found that

> Taylor's question was particularly addressed to the ultimate issue, i.e. whether appellant had committed the murder. Therefore, pursuant to Innis, supra, the questioning eliciting appellant's incriminating response herein arguably constituted interrogation for purposes of Miranda.

State v. Bradley, Scioto App. No. 1583, unreported, (Sept. 22, 1987), p. 15. The question before this Court is whether Petitioner was "in custody" and therefore subject to the safeguards of Miranda.

This Court in Miranda held that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444 (footnote omitted) (emphasis added). Accordingly, the custody element of Miranda is found where there are significant restrictions on the individual's freedom of action, or on the individual's freedom to depart. See, Oregon v. Mathiason, 429 U.S. 492, 495 (1977). As the Court has stated, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree

associated with a formal arrest." California v. Beheler, 463 U.S. 1121 (1983), (quoting Mathiason, supra at 495).

Appellant was detained in the sheet metal shop at the Southern Ohio Correctional Facility. Clearly he was not free to leave the facility. He was not even free to move around the facility or to freely roam the sheet metal shop. This would appear to satisfy the requirements of Miranda.

In Mathis v. United States, 391 U.S. 1 (1968), the Court held that Miranda warnings were required before questions could be put to a prisoner regarding possible criminal tax violations. The government had attempted to distinguish the application of Miranda in the prison setting by urging that the "custody" the inmate faced at the time of the questioning had arisen from another crime. This Court did not adopt this reasoning, stating "[t]hese differences are too minor and shadowy to justify a departure from the well-considered conclusions of Miranda with reference to warnings to be given to a person held in custody." Mathis at 4, (emphasis added). In its decision, this Court held that the inmate there was in custody within the meaning of Miranda, and therefore determined that his statements, obtained without a Miranda warning, had to be suppressed.

Mathis makes it clear that an individual imprisoned, irrespective of the reason for his incarceration, is in custody. During a Motion to Suppress, defense counsel asked one of the courts the following:

> Q. Mr. Seth, would it be an accurate statement to say that Mr. Bradley was detained? By that, I mean he wasn't free to leave the work shop room along with the other individuals?
>
> A. This is true.
>
> Q. He couldn't have left even if he wanted to. He's not free to leave?
>
> A. This is correct.

Tr. 113.

Pursuant to Mathis this testimony of the guards concerning Bradley's statements should never have been admitted because it constituted custodial interrogation without the benefit of Miranda warnings.

However, since this Court decided Mathis, federal courts have narrowed its scope, United States v. Scalf, 725 F. 2d 1272 (10th Cir. 1984); Cervantes v. Walker, 589 F. 2d 424 (9th Cir. 1978), while other courts have adhered to Mathis, United States v. Cadmus, 614 F. Supp. 367 (D.C.N.Y. 1985); United States v. Redfield, 402 F. 2d 454 (4th Cir. 1968); Wade v. Mancusi, 358 F. Supp. 103 (W.D.N.Y. 1973).

In Cadmus, the court found unconvincing the analogy urged by the courts in Scalf and Cervantes to on-the-scene questioning. The court pointed out that on-the-scene questioning rarely, if ever, involves strip searches. "Certainly being disrobed places more restrictions on the individual's freedom of movement. Furthermore, this court in Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 3150, n.28 (1984), specifically distinguished the circumstances of ordinary traffic stops; classic on-the-scene investigation, from the custodial atmosphere surrounding interrogation of an individual while he is in jail." Cadmus at 371. Additionally, the reasoning in the Cervantes are Scalf decisions was squarely rejected by the majority in Mathis.

This Court in Miranda also wanted to obviate the need for case-by-case analysis of the voluntariness of the suspect's confession, or of the coerciveness of the particular circumstances surrounding that confession. See Berkemer, 104 S. Ct. at 3147. The failure of courts to follow the dictates of Mathis have reintroduced, in the prison setting, the case-by-case analysis of coerciveness that Miranda was intended to avoid.

A rule that persons in prison are in custody and must be advised of their rights prior to questioning is fully consistent with the logic underlying Miranda and Mathis. Miranda established a prophylactic rule intended to ensure that suspects are not coerced into confessing. See Berkemer, 104 S. Ct. at 3147; see, also, United States v. Henry, 447 U.S. 264, 273-74 (1980). The rule was designed for situations believed to be intrinsically coercive and susceptible of abuse. See Miranda, 384 U.S. at 467, 86 S. Ct. at 1624 ("inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely"); see, also, Minnesota v. Murphy, 465 U.S. 420, 104 S. Ct. 1136, 1144, 79 L. Ed. 2d 409 (1984). Prison is certainly a "police dominated" surrounding

that is inherently coercive. See, Berkemer, 104 S. Ct. at 3150 n.28. Miranda recognized the powerful psychological effect on a person confined, alone with his interrogator, which often induces the individual to reach for aid. 384 U.S. at 448-55, 86 S. Ct. at 1614-17. This powerful influence is certainly present when the individual is confined in prison. See, Henry, 447 U.S. at 273-74, 100 S. Ct. at 2188. Furthermore, the coercion inherent in custodial interrogation derives in large part from the knowledge of the accused that he cannot escape his interrogator, and that the questioning can continue until the desired answer is obtained. See Miranda, 384 U.S. at 468, 86 S. Ct. at 1624; see also, Murphy, 104 S. Ct. at 1145-46. In Murphy, the Court discussed the situation where "a suspect ... is painfully aware that he literally cannot escape a persistent custodial interrogator." 104 S. Ct. at 1146. It would be hard to conceive of a situation where the accused was less able to escape his interrogator than in a prison setting.

Petitioner request that this Court accept certiorari to clarify its decision in Mathis as to when a person is "in custody" for Miranda purposes during prison interrogation.

CONCLUSION

For all the foregoing reasons, the Petition of Certiorari should be granted. Alternatively, Petitioner requests that the Petition be held pending the outcome of Blystone v. Pennsylvania, U.S. Case No. 88-6222, Boyde v. California, U.S. Case No. 88-6613, and Saffle v. Parks, U.S. Case No. 88-1264, which are all currently before this Court.

Respectfully submitted,

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